

December 19, 2000

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION ON APPEAL OF NOTICE AND ORDER.

SUBJECT: Department of Development and Environmental Services File No. **E9900061A**

BOSTON BISTRO
Code Enforcement Appeal

Location of Violation: 4560 (aka 4520) Klahanie Drive Southeast

Appellant:	Boston Bistro	<i>represented by</i>	Patrick J. Schneider
	4520 Klahanie Dr SE		Stoel Rives Attorneys
	Issaquah, WA 98029		600 University Street #3600
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King County: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section
represented by **John Briggs**
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King County Courthouse, 516 Third Avenue, Seattle, WA 98104
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SUMMARY OF DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Appeal denied

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	May 31, 2000
Statement of appeal received by Examiner:	May 31, 2000
Waiver of Time Limits:	July 13, 2000

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	July 11, 2000
Hearing Opened:	December 1, 2000
Hearing Closed:	December 1, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Commercial signs – height, location and type
- Freedom of speech
- Hearing Examiner jurisdiction
- Substantive due process

SUMMARY:

Boston Bistro's appeal of the Supplemental Notice and Order is denied.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On July 25, 2000 a Supplemental Notice and Order was issued to Holgate/Klahanie, LLC, Claremont Development Company and Boston Bistro, citing the Boston Bistro commercial leasehold for the unlawful placement of signage on the rear wall of the building. The allegation is that the rear wall sign violates the rezone conditions applicable to the property adopted by the King County Council under authority of Ordinance No. 10996.
2. The Supplemental Notice and Order supercedes an original Notice and Order issued on February 16, 2000, and differs from the original document primarily in that it seeks to modify building permit No. B98A4741. The Supplemental Notice and Order asserts that "permit B98A4741 was issued in error in so far as it authorized the sign on the rear of the building to be installed in violation of the rezone conditions . . ." As such it seeks to limit the previously issued permit in the manner authorized by KCC 23.24.100.
3. Boston Bistro has appealed the Supplemental Notice and Order. An amended appeal statement filed on August 15, 2000 includes Constitutional and equitable defenses, as well as questions of code interpretation.
4. Under authority of Ordinance No. 10996 the King County Council adopted a rezone recommendation dated July 28, 1993 imposing strict on-site signage conditions on retail businesses within the Klahanie Commercial Center. As stated by the rezone decision, the

purpose of these signage limitations is to rationalize placement of an urban shopping center along the Urban Growth boundary adjacent to rural properties to the south. The rezone conditions seek to limit the visual impacts of Klahanie Commercial Center signs on nearby residential properties by controlling their size, height and location.

5. As agreed by the parties, the issues on appeal are whether the building mounted sign on the rear wall of the Boston Bistro leasehold building violates rezone condition No. 28 because its highest point extends above 10 feet finished grade as measured from the bottom of the rear wall, and whether such sign violates condition No. 30 of the rezone, which requires that “only directional signs shall be permitted on the rear of a building.” The parties have stipulated that the citation within the Supplemental Notice and Order referring to a violation of rezone condition No. 29 shall be dismissed because the Boston Bistro facility is not a free-standing single-user building.
6. The sign cited with the Supplemental Notice and Order is mounted on the western wall of a commercial leasehold building situated at the northwest corner of the Klahanie Commercial Center. The front of the building is on its east side facing an interior parking lot. The western rear wall faces Klahanie Drive Southeast and, across Klahanie Drive to the west, a large complex of residential condominiums. There are six commercial spaces, each measuring 20 feet wide by 60 feet deep, within the northwest leasehold facility. Boston Bistro occupies the northernmost of these six leasehold spaces. Five of the six spaces are currently occupied by commercial tenants, all of them restaurants. All five commercial tenants have frontage signs facing east into the parking lot, and three of the five have erected a second set of signs on the rear wall facing Klahanie Drive. A fourth tenant has a large fabric banner hung on the western rear wall.
7. The rear wall signage for Boston Bistro consists of an illuminated sign approximately 2 feet high by 16 feet long. About 80% of the length of the sign consists of the words “Wood Fired Pizza” in yellow letters, with the remaining portion of the sign comprised of a Boston Bistro logo. The sign contains no directional information. The portion of the northwest facility rear wall assigned to the Boston Bistro franchise contains a total area of 360 square feet. The Boston bistro rear sign reaches a maximum height of 13-feet 6-inches measured from the bottom of the wall.
8. According to testimony offered by Phil Davidson, president of Claremont Development Company (the property manager for Klahanie Commercial Center), and Robert Haar, owner of Boston Bistro, the Boston Bistro lease was signed on August 27, 1996, before the Klahanie Commercial Center was actually built. According to Mr. Haar, the agreement contained a provision that allowed him to opt out of the lease if he were not permitted to erect a business sign on the western rear wall of the commercial leasehold building. As related by Mr. Davidson, he met on May 7, 1998, with Ramon Locsin, a DDES permit technician, at which time he was informed that rear signs would be allowed on Commercial Center leasehold buildings so long as they were located at least 150 feet north of the Issaquah/Fall City Road right-of-way. Since Mr. Haar’s leasehold space was more than 800 feet north of the Issaquah/Fall City Road, Mr. Davidson told Mr. Haar on May 20, 1998, that his rear sign would be permitted. Mr. Haar testified that a few days thereafter he telephoned Mr. Locsin to confirm this information.
9. The Sign Factory, on behalf of Mr. Haar, obtained a sign permit from King County Department of Development and Environmental Services on December 18, 1998 for

construction of on-premises front and rear signs. Although the rear sign is mounted somewhat higher than shown on the permit drawings, it is nonetheless clear that these drawings depict a rear wall signage height in excess of 11 feet. \$469.00 in permit fees were charged by DDES for the Boston Bistro sign, based on an estimated valuation of \$2,700.00. Mr. Haar testified that his actual sign cost was approximately \$7,000.00. The sign was finally inspected and approved on March 2, 1999.

10. Mr. Davidson also testified that subsequent to construction of the Boston Bistro sign he held further meetings with King County DDES concerning rezone sign requirements. This included a meeting on May 24, 1999 with Ken Dinsmore, the DDES Permit Center supervisor. Mr. Davidson related that he was again told that rear wall signs were allowed so long as they were further than 150 feet from Issaquah/Fall City Road. But Mr. Davidson stated on cross-examination that he did not specifically request an interpretation of rezone condition No. 30, because he understood it to only apply to Pad D of the Commercial Center.

More recently, in March, 2000, representatives of Boston Bistro discussed with DDES a proposal for a directional sign to be installed on the rear wall of the Boston Bistro leasehold as a replacement for the existing signage. The record indicates that this concept was rejected by DDES as not complying with the code definition for a directional sign. As memorialized in the minutes of a DDES Regulatory Review Committee meeting for March 22, 2000, the proposal was rejected on the basis that the Boston Bistro name as submitted in the design was not incidental to the directional information. Rather, according to the testimony of Mr. Dinsmore, the Committee concluded that the commercial name was the predominant feature or aspect of the proposal. The DDES decision rejecting Boston Bistro's directional sign proposal is not subject to review within this appeal proceeding.

11. As noted previously, the rear wall signage for Boston Bistro is visible to the residents of the condominium complex located west of Klahanie Drive. Mr. Haar also submitted photographs demonstrating that his leasehold space, being the northernmost tenancy within the northwestern commercial building, is barely visible from the main Commercial Center parking lot and cannot be seen at all from the front of the Commercial Center's anchor tenant, the QFC Market. Mr. Haar also described the results of a recent client survey that he conducted which indicated that about 80% of his customers first learned of the existence of his business from seeing the Boston Bistro sign on the rear wall of the building facing Klahanie Drive.

CONCLUSIONS:

1. A number of the Appellant's contentions are based on the assertion that the rezone conditions adopted under authority of Ordinance No. 10996 are ambiguous as they apply to the issues underlying this appeal. The assertion is that this ambiguity either requires deference to be given to earlier DDES interpretations as to the meaning of such conditions, or alternatively requires a present interpretation constructed in a manner to avoid potential Constitutional infirmities. With the dismissal of condition No. 29 as a basis for the Notice and Order, we are presented with the question of interpreting conditions 28 and 30.

2. Rezone condition No. 28 reads as follows:

“Building-mounted signs are not permitted on façades that face either Klahanie Drive or Issaquah/Fall City Road within 150 feet of the north edge of the Issaquah/Fall City Road right-of-way. No building-mounted sign on-site shall extend above 10 feet finished grade or the building façade (wall), whichever is less. No building shall be designed or lighted in a way that makes it function as a sign.”

Our reading of condition No. 28 is that it is intended to apply to all buildings within the Klahanie Commercial Center and sets out three unrelated prohibitions. The first sentence asserts that no building-mounted sign may be erected within 150 feet of the Issaquah/Fall City Road right-of-way. It applies to all building walls, whether front, back or side. The second limitation also applies to all building walls within the shopping center and imposes a 10-foot height limit on building-mounted signs. Finally, the third sentence applies to all structures and prohibits the use of structural lights for signage purposes. Only the second sentence of condition No. 28 directly applies to the Boston Bistro Notice and Order citation, which contains an allegation that the rear signage exceeds 10 feet in height.

3. Rezone condition No. 30 reads as follows:

“Only directional signs shall be permitted on the rear of a building. The rear of the building located on Pad D shall be no less than 200 feet from the northern edge of the Issaquah/Fall City Road right-of-way. No exterior lighting, signage or service doors, with the exception of emergency exit doors, shall be located at the rear of the building located on Pad D.”

The first sentence of condition No. 30 states a general limitation applicable to all buildings within the shopping center. The remainder of the condition applies only to the building located on Pad D, which is the southernmost structure within the Klahanie Commercial Center. Accordingly, only the first sentence of condition No. 30 applies to Boston Bistro, and the violation alleged within the Notice and Order is that Boston Bistro contains signage on the rear of its building that is not a directional sign.

4. There is no conflict or inconsistency between the first sentence of condition No. 28 and the first sentence of condition No. 30. Condition 28 prohibits signage on any walls within 150 feet of Issaquah/Fall City Road, while condition 30 deals with rear building signage wherever located. The provisions overlap to the extent that rear wall signage on a building located within 150 feet of Issaquah/Fall City Road would be prohibited by both conditions. The notion, however, that the first sentence of condition 30 ought to be read as referring only to Pad D is contradicted both by the generality of language used and the fact that the rear of Pad D is not adjacent to a parking lot and therefore would not require a directional sign.
5. There is also an important question of Hearing Examiner jurisdiction that underlies review of the issues raised within this appeal. The Appellant in its amended statement of appeal has raised both Constitutional and equitable doctrines as a defense to the Supplemental Notice and Order. Since hearing examiners only possess those powers that have been assigned to them by statute or ordinance, the question arises as to whether this forum possess the jurisdictional authority necessary to entertain the

Appellant's arguments. Both parties have briefed these issues, with the attorney for DDES arguing that the Examiner lacks the jurisdictional authority to entertain any Constitutional or equitable issues.

6. We agree that this restricted view of Hearing Examiner jurisdiction must prevail when it comes to dealing with facial challenges to the validity of an ordinance or regulation, but where the application of an ordinance or regulation is unclear and the legislative enactment requires interpretation, our view has consistently been that the Hearing Examiner is empowered (and probably required) to provide interpretations of relevant ordinances and regulations in a manner that avoids violating Constitutional principles.
7. Further, the recently enacted provisions of KCC Title 23 confer a measure of authority to recognize relevant Constitutional principles and equitable doctrines in the review of alleged code enforcement violations. In the Title's purpose section, KCC 23.01.010.B first relates the County's intention to pursue code compliance in order to protect the health, safety and welfare of the general public, but then states that "this County intention is to be pursued in a way that is consistent with adherence to and respectful of fundamental Constitutional principles."

Moreover, the need for a flexible regulatory response based on considerations of justice has also been recognized within Title 23. For example, under certain conditions a property owner, even though in technical violation of a code requirement, is to be held responsible "only for bringing the property into compliance to the extent reasonably feasible under the circumstances" (KCC 23.02.130.B). On a similar note, KCC 23.02.040.H confers upon County administrators the authority to waive code requirements "so as to avoid substantial injustice." Comparable latitude is conferred upon the Hearing Examiner within an administrative appeal where "strict compliance with permit requirements may be waived regarding the performance of...an abatement in order to avoid doing substantial injustice to a non-culpable property owner" (KCC 23.36.030.B).

8. Applying these code provisions to the specific context of this appeal, it is our view that the Hearing Examiner has been provided with sufficient authority to recognize Constitutional claims in the application of County regulations in code enforcement proceedings, but has not been provided jurisdiction to rule upon a claim of equitable estoppel. While the duty to adhere to fundamental Constitutional principles is specifically recognized at KCC 23.01.010.B, no similar authority can be cited in support of jurisdiction to recognize an equitable estoppel claim. The portions of Title 23 previously cited dealing with avoidance of substantial injustice introduce equitable considerations into the review process but only apply where the property owner either has obtained no apparent benefit from the code violation or is non-culpable due to the fact that the violation was caused by the actions of a non-agent third party. Neither of these circumstances apply to this appeal. Moreover, the issue of jurisdiction to rule on an equitable estoppel claim must be evaluated in the context of KCC 23.24.100.A.3, which authorizes a permit to be revoked or modified on the grounds that it was issued in error. The existence of this provision negates the argument that Title 23 creates a defense based on an appellant's reliance on staff misinformation or erroneous permit approval.
9. The Appellant's Constitutional claims rely on the doctrine of substantive due process and First Amendment rights protecting free speech. The doctrine of substantive due process

- subjects the operation of regulations to review for reasonableness. The Washington Supreme Court has set out a three-pronged test for determining whether a substantive due process violation has occurred: “(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.” *Presbytery of Seattle v. King County*, 114 Wn 2nd 320 at 330 (1990).
10. The United States Supreme Court in the leading case of *Metromedia, Inc v. San Diego*, 453 US 490 (1980), has set out the following test for determining the validity of governmental restrictions on commercial speech:

“(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.” 453 US at 507.
 11. Both the Appellant’s substantive due process and First Amendment arguments focus on the question of whether the first sentence of rezone condition No. 30 uses means that are necessary and appropriate to achieve its public purpose, and therefore can be said to directly advance such purpose. There is no serious dispute that the essential function of the rezone sign conditions is to protect off-site residential properties from adverse visual impacts from commercial signage, and that this is a legitimate government function. Nor is there any question that the Boston Bistro rear sign at issue is protected commercial speech. Within the substantive due process context, the Appellant’s contention that the rezone regulation is unduly oppressive depends on an argument that, if the governmental means are ineffective or inappropriate, then the public side of the scale lacks any substantial content and the restriction is oppressive, per se.
 12. The Appellant’s essential argument can be summarized as follows: Rezone condition No. 30 allows only directional signs to be constructed on the rear walls of the Commercial Center buildings. KCC 21A.06.1105 defines “directional sign” as “a sign designed to guide or direct pedestrian or vehicular traffic to an area, place or convenience, and may include incidental graphics such as trade names and trademarks.” Within the Community Business zone, KCC 21 A.20.100 on-premises allows wall signs to be constructed, provided they do not comprise more than 15% of the building façade on which they are located. Boston Bistro’s rear wall has an area of 360 square feet. 15% of 360 square feet is 54 square feet, which is the allowable maximum square footage for a wall sign under the code provision. The current Boston Bistro rear wall sign occupies 32 square feet in area. The Appellant could therefore replace the existing commercial sign with a directional sign nearly twice as large, on which its name and logo could be included. Since the visual impact of rear wall signs is proportional to their size and unrelated to the specific message of the signage, the conclusion is that enforcement of the directional sign restriction contained in rezone condition No. 30 would not advance the substantial government interest for which it was enacted.
 13. The fundamental problem with the Appellant’s argument is that it is based upon an incomplete reading of the County sign regulations. The provisions contained in KCC Chapter 21A.20 progress from the general to the particular. The general regulations are set out first, and then qualified with specific adjustments in their application to the

various zoning districts. The Appellant's argument focuses exclusively on the sign area provisions specific to the Community Business zone without considering how those requirements are linked to the general sign requirements stated at KCC 21A.20.060.

14. KCC 21A.20.060 states requirements applicable to all signs regardless of where they are located. Of critical importance to our discussion is subsection E, which deals with directional signs. This subsection informs us that the 15% area limit on wall signs stated in KCC 21A.20.100 for the Community Business zone does not apply to directional signs. Rather, the standard for directional signs is that "they shall not exceed 6 square feet in surface area and are limited to one for each entrance or exit to surface areas or parking structure." Since the building in which the Boston Bistro leasehold is located is flanked on both the north and south sides by entrance driveways, the maximum amount of directional signage that may be erected on the entire rear wall is two signs with a total area of 12 square feet.
15. Twelve square feet of directional signage for the building as a whole is, of course, less than half of the 32 square feet currently occupied by the Boston Bistro sign. Moreover, if the Boston Bistro rear commercial sign is permitted, each of the other five tenants within the building logically would be entitled to a similar sign, resulting in a potential business sign coverage for the entire rear wall in excess of 300 square feet. In short, the directional sign limitation contained within rezone condition No. 30 vastly reduces the signage potential on the rear wall of the leasehold building and thereby directly serves the public purpose of decreasing visual impacts to off-site residential properties.
16. Although not a major element in the Appellant's argument, we also conclude that the condition No. 30 restriction does not impinge upon noncommercial speech and is tailored to reach no further than necessary to achieve its legitimate government objective. Both on-premises commercial signs and directional signs are forms of commercial speech. While they each have visual impacts on off-site residential occupants, the decision by the County to allow directional signs only is supported by a policy to promote efficient circulation of traffic into the Commercial Center, thereby reducing traffic congestion and inadvertent risk to pedestrians from confused drivers. The fact that directional signs are allowed to carry incidental commercial information simply underscores the reasonableness of the restriction, which serves both a public informational interest while allowing limited commercial advertising speech to occur. These kinds of policy-based distinctions between different types of commercial speech were found permissible by the United States Supreme Court in the *Metromedia* case cited above.
17. Finally, the Appellant has raised issues in its written materials that were not the subject of hearing testimony or argument. First, there is the contention that a code enforcement proceeding cannot be brought against a commercial tenant with respect to a rezone condition that is not a codified rule of general applicability. The record demonstrates that Boston Bistro had actual notice of the rezone conditions prior to entering into its lease. Moreover, the definitions of "civil code violation" and "person responsible for code compliance" stated at KCC 23.02.010 establish that permit conditions adopted by ordinance, whether codified or not, are subject to the code enforcement process and that tenants are liable for the violation of such conditions.
18. The Appellant has also argued that it is vested to the rezone conditions as interpreted by DDES staff at the time of sign permit application, or alternatively based on this earlier

- DDES interpretation, that Boston Bistro now qualifies as a legal nonconforming use. Both of these arguments beg the fundamental question, which is, "What do the rezone conditions require?". As discussed above, the rezone conditions are not intrinsically ambiguous, notwithstanding that they may have been incorrectly interpreted by DDES staff. There is no vested right to an incorrect reading of a regulation, nor is a use in conformity therewith deemed legally established.
19. Finally, the Appellant has argued that the first sentence of rezone condition No. 30 is void for vagueness because the Zoning Code definition of "directional sign" contains an ambiguous reference to "incidental graphics" of a commercial nature. While this may be an interesting legal question, as DDES suggests the Appellant has no standing to raise it because the structure subject to this enforcement appeal possesses no characteristics that would qualify it as a directional sign.
 20. The Boston Bistro rear wall sign cited within the Supplemental Notice and Order violates rezone condition No. 28 because it is more than 10 feet high, and condition No. 30 because it does not meet the requirements for a directional sign. The terms of building permit No. B98A4741 are modified consistent with these findings and conclusions.

DECISION:

The appeal is denied.

ORDER:

No penalties shall be incurred if the Appellant performs the following action within 60 days of the date of this order:

1. Removes the signage from the western rear wall of its leasehold building.

ORDERED this 19th day of December, 2000.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 19th day of December, 2000, by certified mailing to the following parties:

Robert Haar
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TRANSMITTED this 19th day of December, 2000, to the following parties and interested persons:

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE DECEMBER 1, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9900061A – BOSTON BISTRO:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Jeri Breazeal and John Briggs from the King County Prosecuting Attorney's Office. Participating in the hearing and representing the Appellant were Attorneys Patrick Schneider and Katriana Samiljan; also Appellant Robert Haar. Other participants in this hearing were Appellant Witnesses Phil Davidson and Ken Dinsmore.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 DDES staff report to the Hearing Examiner, dated December 1, 2000
- Exhibit No. 2 Notice & Order, issued February 16, 2000
- Exhibit No. 3 Notice of Appeal and Statement of Appeal, received March 13, 2000
- Exhibit No. 4 Supplemental Notice & Order, issued July 25, 2000
- Exhibit No. 5 November 3, 1999 letter sent to Boston Bistro from DDES
- Exhibit No. 6 Amended Appeal, received August 15, 2000
- Exhibit No. 7 Approved sign permit that was part of sign permit B98A4741
- Exhibit No. 8 Pre-Hearing Order, issued July 13, 2000
- Exhibit No. 9 Copy of two photographs showing signs
- Exhibit No. 10 Rezone Conditions
- Exhibit No. 11 Minutes of March, 2000 DDES Regulatory Review Committee meeting
- Exhibit No. 12 Copy of signed permit for signage, dated December 19, 1998
- Exhibit No. 13 Copy of final inspection for signage, dated March 2, 1999
- Exhibit No. 14 Site plan
- Exhibit No. 15A-15P Photographs
- Exhibit No. 16 E-mail communication between Jeri Breazeal and Lisa Lee
- Exhibit No. 17 E-mail communications between Lisa Lee and Karen Scharer